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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1214

HENRY FLETCHER THOMAS - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

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IN THE

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October Term, 1974

No. _____

HENRY FLETCHER THOMAS - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals was entered on February 24, 1975. This decision will not be published. A copy of that opinion is presented to the Court in Appendix A attached hereto.

JURISDICTION

The opinion of the Sixth Circuit Court of Appeals was rendered and entered on February 24, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

A. Whether the petitioner was denied a fair trial due to the erroneous admission of both evidence of other crimes either committed or allegedly committed by the petitioner and of the petitioner's prior criminal record in relation to the time he spent in jail.

B. Whether 18 U.S.C. Appx. §1202(a)(1) is applicable to a convicted felon's receipt of a firearm when said firearm was not in or affecting commerce after the date of enactment of this Act.

STATUTE INVOLVED

18 U.S.C.A. Appx. §1202(a)(1) at page 494:

> Any person who has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

A. Nature of the Proceedings

On July 9, 1974, an indictment was returned before Judge Charles Allen, charging the petitioner with violation of 18 U.S.C. Appx. §1202(a)(1)—a convicted felon in possession of a firearm. The Honorable James F. Gordon presided over the trial by jury which was

held on August 22, 1974. The jury found the petitioner guilty as charged in the indictment. On August 29, 1974, judgment and commitment were entered ordering the petitioner to serve a two (2) year sentence. Notice of appeal was filed on August 30, 1974. On February 24, 1975, the Sixth Circuit Court of Appeals filed an Order affirming this decision (Appendix A).

B. Statement of the Facts

In the early morning of February 17, 1974, the petitioner, who had previously been convicted of a felony, along with another individual, Robert Faust, was arrested by officers of the Louisville police force. A gun was recovered from these individuals; however, there was a conflict in the testimony as to who was in possession of the gun at the time of the arrest. The charges placed against the petitioner that day were filed away in the Louisville city police court. On June 6, 1974, the petitioner was arrested by Agent Patrick Sheehy of the Bureau of Alcohol, Tobacco and Firearms. The aforementioned indictment resulted from this arrest.

At trial there were constant references to crimes either committed or allegedly committed by the petitioner. To each of these references the petitioner objected. The evidence at trial revealed that the gun traveled in interstate commerce in January of 1968, and had not been in interstate commerce since that date. The evidence further revealed that the petitioner had been convicted of a felony in April of 1968. The

petitioner stipulated that he had been in the LaGrange Reformatory, and previously convicted of a felony.

As stated above, the jury retired and returned a verdict of guilty.

REASONS FOR GRANTING THE WRIT

A. The Petitioner Was Denied a Fair Trial Due to the Erroneous Admission of Both Evidence of Other Crimes Either Committed or Allegedly Committed by the Petitioner and of the Petitioner's Prior Criminal Record in Relation to the Time He Spent in Jail.

Throughout the trial of this case, testimony was admitted which related to other crimes either committed or allegedly committed by the petitioner, and to the petitioner's prior criminal record in relation to the time he spent in jail. The Court of Appeals for the Sixth Circuit maintained that while the admission of this evidence was erroneous, they believed it was harmless error beyond a reasonable doubt (Appendix A). The petitioner asserts that the admission of this testimony denied him a fair trial and that the opinion of the Sixth Circuit Court of Appeals sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is well established that evidence of prior criminal activity is generally inadmissible to prove the charge for which the criminal defendant is currently standing trial, *United States* v. *Rudolph*, 403 F. 2d 805 (6th Cir., 1968), and *United States* v. *Nemeth*, 430 F. 2d 704 (6th Cir., 1970). Equally well established is

the doctrine that the government may not attempt to introduce evidence in its case-in-chief of a defendant's imprisonment, *Michelson* v. *United States,* 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948); *United States* v. *Gray,* 468 F. 2d 257 (3d Cir., 1972); and *United States* v. *Nemeth, supra.* Furthermore, where inadmissible evidence is admitted, an important element of a fair trial is destroyed, *Bruton* v. *United States,* 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). Therefore, if statements were admitted at trial which were inadmissible, it is readily apparent that the petitioner was denied a fair trial.

Notwithstanding the fact that due to the nature of the offense involved in the case at bar certain aspects of the petitioner's prior criminal activity must be introduced, the entire proceeding in the lower court was replete with allegations and insinuations as to the petitioner's criminal activity and his conduct as a prisoner. Various offenses were alleged to have been committed by the petitioner. Those offenses were as follows: theft, stripping an automobile, and grand larceny. These allegations were made by different witnesses. Furthermore, the actual nature of the offense for which the petitioner had previously been convicted was mentioned at numerous stages in the proceeding. Although the petitioner does not question that the fact that he had previously been convicted of a felony was relevant, he does maintain that the actual offense for which he had been convicted should not have been disclosed to the jury. As stated above, there was also evidence which related to the petitioner's prior crim-

inal activity. The arresting officer stated that after the petitioner had been given his Miranda warnings, the petitioner stated that he had served every day of his prison sentence. The government also went into detail as to fingerprints secured from the penitentiary where the petitioner had served his sentence. Clearly, the admission of this testimony denied the petitioner a fair trial.

Congress, through the Commerce Clause, has extended the jurisdiction of the federal government to still another essentially state offense. The nature of this charge is prejudicial to the defendant in the first instance. Therefore, the courts should carefully protect the safeguards of the defendant to insure that a fair trial is provided. The proceeding in the lower court could not have been deemed a fair trial.

Wherefore, the petitioner calls for this Court to exercise its power of supervision and grant certiorari inasmuch as the opinion rendered by the Sixth Circuit Court of Appeals in this case has sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings.

B. 18 U.S.C. APPX. §1202(a)(1) Is Not Applicable to a Convicted Felon's Receipt of a Firearm When Said Firearm Was Not in or Affecting Commerce After the Date of Enactment of This Act—June 19, 1968.

The question presented is whether 18 U.S.C. Appx. §1202(a)(1) is applicable to a convicted felon's receipt of a firearm when said firearm was not in or affecting commerce after the date of enactment of this Act—

June 19, 1968. The opinion rendered by the Sixth Circuit Court of Appeals in this case decided an important question of federal law which has not been, but should be, settled by this Court.

The petitioner asserts that the phrase "after the date of enactment of this Act" modifies not only the verbs "receives, possesses or transports," but also the phrase "in or affecting commerce." Therefore, not only must the receipt, possession or transportation of the firearm be subsequent to June 19, 1968, the nexus with interstate commerce must also be subsequent to that date. In *United States* v. *Bass,* 404 U. S. 336, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971), this Court stated that the government could establish this nexus in regard to receipt of a firearm if the government could show that the firearm had *previously* travelled in interstate commerce. The Court left open the question as to any modification of the word *previously.* The petitioner asserts the modification required by the statute is that the interstate travel of the firearm must be subsequent to June 19, 1968.

In the case at bar, the only time the firearm was "in or affecting commerce" was in January of 1968, prior to the date of enactment of the act in question. As stated in *Bass, supra,* at page 350, the offense of "possession or transportation of a firearm in or affecting interstate commerce" may be established "if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce." However, should the statute be interpreted to denounce all transactions where a con-

victed felon receives a firearm which has at some point during the life of the weapon travelled in interstate commerce, whether before or after the date of enactment of this Act, then the statute would be given a retroactive effect. This would be contrary to the long-cherished doctrine of jurisprudence that laws are enacted for the future. This Court held in *United States v. Donnelly's Estate,* 397 U. S. 286, 294, 90 S. Ct. 1033, 1038, 25 L. Ed. 2d 312 (1970) that "Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward." Furthermore, "retroactivity, even where permissible, is not favored, except from the clearest mandate, . . ." *Claridge Apartments Co. v. Commissioner of Internal Revenue,* 323 U. S. 141, 164, 65 S. Ct. 172, 185, 89 L. Ed. 139 (1944). The ambiguity of this statute was recognized by this Court in *Bass, supra.* Therefore, it cannot be said that this statute provides the *clearest mandate* for its retroactive application. Thus, this statute is not to be retroactively applied. As a result, the nexus with interstate must occur at some point after the date of enactment of this Act. Inasmuch as the only nexus with interstate commerce in the case at bar transpired prior to the date of enactment of this Act, the conviction rendered in the lower court cannot stand.

Wherefore, the petitioner asserts the opinion rendered by the Sixth Circuit Court of Appeals in this case erroneously decided an important question of federal law which has not been, but should be, decided by this Court; therefore, this Court should grant certiorari in the case at bar.

CONCLUSION

The reasons set forth above clearly show the Sixth Circuit Court of Appeals has both sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and decided an important question of federal law which has not been, but should be, settled by this Court. We urge this Court to grant certiorari to decide these questions.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 74-2137

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

HENRY FLETCHER THOMAS - - *Defendant-Appellant*

ORDER—Filed Feb. 24, 1975

Before: EDWARDS, PECK and LIVELY, Circuit Judges.

This appeal, perfected from the judgment of conviction following jury trial of the defendant-appellant for having been a convicted felon in possession of a revolver which had traveled in interstate commerce in violation of 18 U.S.C. App. § 1202(a)(1), has been submitted on the record on appeal and on the briefs and oral arguments of counsel for the parties. Appellant contends, inter alia, that although evidence of a prior conviction was properly received in evidence, the presence in the record of testimony by a government witness that appellant "was sentenced to five years" and had "served every day of that five-year sentence at both LaGrange and Eddyville" constituted prejudicial error. Rejecting the appellee's argument that the sentence imposed is relevant to the status of a prior conviction as a misdemeanor or felony, since that determination is based on the maximum sentence permitted by the statute under which the conviction was returned, we conclude that the

challenged evidence was improperly received. However, it is further concluded that in the light of the entire record the admission of such evidence was harmless error beyond a reasonable doubt. It is further concluded that the other contentions offered by the appellant are without merit, and acordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1214

HENRY FLETCHER THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. App. 1202(a), which prohibits previously convicted persons from receiving firearms in or affecting interstate commerce, does not encompass the receipt of a firearm which had been transported in interstate commerce prior to the date the statute was enacted. Petitioner also contends that he was denied a fair trial by the introduction of evidence that his prior felony conviction was for robbery, that he served five years in prison for that offense, that evidence of his receipt of the firearm came to light when he was arrested for "stripping" an automobile, and that he stated to the federal arresting officer that he had stolen the firearm.

After a jury trial in the United States District Court for the Western District of Kentucky, petitioner, having previously been convicted in state court of robbery, was convicted of receiving and possessing a .22 caliber Rossi revolver that had previously moved in interstate commerce, in violation of 18 U.S.C. App. 1202(a). Petitioner was sentenced to two years' imprisonment, and the court of appeals affirmed (Pet. App. A11).

On February 17, 1974, two Louisville, Kentucky, police officers, responding to a radio call, came upon petitioner and Robert Faust as they were "stripping" an automobile and loading the parts into the back of their car (Tr. 54-55). The officers approached petitioner and Faust with their guns drawn, told them they were under arrest, and ordered them not to move (Tr. 50-51). However, when petitioner placed his hand in his right coat pocket, one of the officers ordered petitioner to "freeze" and removed his hand, which was holding a fully-loaded .22 caliber Rossi revolver, from the pocket (Tr. 51, 52, 55).

After receiving *Miranda* warnings, petitioner told the officers that he had just been released from prison, having served a sentence for robbery (Tr. 53-54). Subsequently, when petitioner was arrested by a federal agent for receiving and possessing the revolver and warned of his constitutional rights, he made several admissions: that he had stolen the revolver the night before his arrest by the local police; that he had been convicted in state court for robbery; and that he had served five years in prison for that offense (Tr. 31-33, 34). At about the mid-point of the trial, petitioner stipulated that he had been convicted of robbery (Tr. 65) and that the firearm in question had been transported from Ohio to Kentucky (by someone other than petitioner) on or about January 18, 1968 (Tr. 66, 68, 69).

Petitioner testified, contrary to the testimony of the arresting officers, that although both he and Faust were involved in the theft of the revolver, Faust had possession of the firearm at the time of their arrest (Tr. 90, 97). Faust, as a defense witness, testified to the same effect; he also stated that he had never been convicted of a felony (Tr. 100-101, 105-106).

1. Petitioner contends that 18 U.S.C. App. 1202(a) does not encompass the receipt of a firearm that had been transported in interstate commerce prior to June 19, 1968, the date Section 1202(a) was enacted into law.

In *United States* v. *Bass*, 404 U.S. 336, 350, this Court stated, however, that the government meets its burden under Section 1202(a) of demonstrating an interstate nexus "if it demonstrates that the firearm received has previously traveled in interstate commerce." Although the narrow question raised by petitioner was not presented in *Bass*, we submit that the foregoing quotation, in which the Court did not recognize any time limit on the previous interstate transportation, is a correct statement of the law. Courts of appeal in three circuits, in addition to the Sixth Circuit in the instant case, have affirmed judgments under Section 1202(a) where the only interstate movement of the firearm occurred prior to the enactment of the statute. *United States* v. *Three Winchester 30-30 Cal. L. Act. Car.*, 504 F.2d 1288, 1291 n. 7 (C.A. 7); *United States* v. *Mancino*, 474 F.2d 1240, 1241-1242 (C.A. 8), certiorari denied, 412 U.S. 953; *United States* v. *Giannoni*, 472 F.2d 136, 137 (C.A. 9), certiorari denied, 411 U.S. 935.

While proof of interstate movement of the firearm is essential to establish federal jurisdiction, it is not part of the *actus reus* of the offense of "receiving." That is, the government is not required to prove that the defendant caused the interstate movement of the weapon, nor indeed that he knew the weapon had so moved. See, *e.g.*, *United States* v. *Lupino*, 480 F.2d 720 724 (C.A. 8), certiorari denied, 414 U.S. 924; *United States* v. *Mullins*, 476 F.2d 664 (C.A. 4), certiorari denied, 414 U.S. 839; *United States* v. *Belperio*, 452 F.2d 389, 391 (C.A. 9). Since petitioner, a convicted felon, received the firearm subsequent to the enactment of Section 1202(a), the fact that the firearm did not travel in interstate commerce after the date of enactment is irrelevant, and petitioner's conviction does not involve a retroactive application of Section 1202(a).

2. Petitioner contends that he was denied a fair trial by the introduction of evidence that his prior felony conviction was for robbery, that he served five years in prison for that offense, that his receipt and possession of the firearm was discovered when he was arrested for "stripping" an automobile, and that he stated to the federal officer who arrested him that he had stolen the firearm. None of these claims has merit.

a. The indictment charged and evidence was admitted to prove that prior to the time petitioner received the revolver he had been convicted of robbery. Petitioner concedes that it was proper to inform the jury that he had been convicted of a felony, but he claims the jury should not have been told that the felony was robbery (Pet. 5). However, the government was obliged to prove petitioner's prior conviction, since petitioner did not stipulate to the conviction until after the following had occurred at trial: the district court informed the jury panel of the nature of the case, the prosecutor read the indictment to the jury,[1] the federal investigator testified that petitioner admitted to having been convicted of robbery and that he had requested a comparison of petitioner's fingerprints with those of the Henry Fletcher Thomas who had been in prison for the robbery, a police officer testified that petitioner admitted to the robbery conviction, and a fingerprint expert was qualified so that he could give his opinion of the fingerprint comparison (Tr. 4-5, 27, 34, 35-37, 54, 64). Under the circumstances, evidence of the nature of the felony was properly admitted. *United States* v. *Kemper*, 503 F.2d 327, 330 (C.A. 6), certiorari denied, No 74-5461, January 20, 1975; *United States* v. *Fields*, 500 F.2d 69, 70 (C.A. 6), certiorari denied, 419 U.S. 1071; cf. *Spencer* v. *Texas*, 385 U.S. 554;

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[1]Petitioner did not move to strike from the indictment the identification of his felony conviction as that of robbery. Cf. *United States* v. *Kemper*, 503 F.2d 327 (C.A. 6), certiorari denied, No. 74-5461, January 20, 1975; *United States* v. *Fields*, 500 F.2d 69 (C.A. 6), certiorari denied, 419 U.S. 1071.

Michelson v. *United States*, 335 U.S. 469, 475 n. 8. Moreover, since petitioner testified in his own defense, evidence concerning petitioner's prior felony conviction would have been admissible for impeachment purposes. See *Spencer* v. *Texas, supra*, 385 U.S. at 560-561.

b. Petitioner argues that reference to the fact that he served five years in prison for the robbery conviction was prejudical.[2] Althou h petitioner objected to the testimony, when the trial court subsequently instructed the jury that the fact that petitioner had spent five years in prison was "of no consequence or significance in this case," petitioner objected to the instruction, stating that it was "contrary to Defense counsel's argument that he had already been punished" for the robbery and should not be put "back [in] the penitentiary" (Tr. 114, 131, 134, 139). Although petitioner contended in the court of appeals both that the admission of the evidence was error and that the cautionary instruction was prejudicial (Br. 18-19), he now argues only that the evidence was prejudicial. However, even assuming that it was improper to inform the jury that petitioner had served five years in prison, the introduction of this evidence was, as the court of appeals held (Pet. App. A12), harmless beyond a reasonable doubt.

c. Petitioner contends that it constituted prejudicial error to introduce evidence that he and Faust had stolen the firearm. But petitioner's receipt of the firearm after his felony conviction was an essential element of the offense, and the evidence was manifestly relevant to establish that element. Moreover, when petitioner objected to this evidence, the trial court instructed the jury that petitioner was not on trial for theft of the weapon and that the jury should disregard the evidence concerning the theft

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[2]The reference occurred in the course of testimony of a government agent (Tr. 34) that, as shown earlier, was necessitated by petitioner's refusal to stipulate to his prior felony conviction.

(Tr. 34). Subsequently, both petitioner and his witness, Robert Faust, testified that they had stolen the revolver (Tr. 97, 105). Under the circumstances, petitioner cannot complain.

d. Petitioner claims that he was prejudiced by testimony concerning the circumstances of his arrest by the local police and by the fact that the jury learned that the police had charged him with grand larceny for removing the automobile parts. However, the discovery of the firearm in petitioner's pocket (a matter as to which the evidence was in conflict) was so inextricably tied to his arrest and his activities at the time of his arrest that the two could not have been separated. In addition, it was necessary to explain to the jury how the government learned of the offense and obtained the evidence, since without an explanation the jury could have inferred that petitioner had been the object of police misconduct and was entitled to leniency. Moreover, the trial court instructed the jury that "the charges placed against this man by the City Police growing out of this alleged occurrence are of no concern to us. We are only concerned with whether he had possession of a weapon" (Tr. 56). Finally, petitioner himself brought out that the grand larceny charges had been "filed away" because there was no prosecuting witness (Tr. 59). Under these circumstances, petitioner suffered no prejudice.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.